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Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

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M.F. GUETERSLOH, JR.,
Petitioner

v.

THE STATE OF TEXAS, et al.,
Respondents

****

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

****

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QUESTION PRESENTED FOR REVIEW

Is the Eleventh Amendment a procedural bar to a takings claim under the Fifth and Fourteenth Amendment to the U.S. Constitution, in an inverse condemnation suit against a State and its officials?

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CONSTITUTIONAL PROVISIONS INVOLVED

The following constitutional provisions are at issue: U.S. Const. Amend. V, XI, and XIV.

STATEMENT OF THE CASE

In 1982, Petitioner owned a lienholder's interest in a small, privately owned water system in the rural Carlisle community near Lubbock, Texas, having sold the system to an individual named Ray Nichols. Petitioner retained a vendor's lien and deed of trust as security. The system was in a dilapidated condition at the time of the sale to Nichols.

Nichols managed the utility in violation of state statutory standards and after reviewing complaints from customers, the Public Utility Commission (PUC)[1] investigated, held hearings, and on October 22, 1982, ordered Nichols to remedy a number of serious technical and managerial deficiencies.

When the violations continued, PUC filed suit in state district court in Travis County to declare statutory receivership[2]. In July, 1983, a Travis County court named James Miller receiver and directed him to take possession of and operate the utility to prevent interruption of service and to maintain compliance with the Health Department and PUC standards.

In late 1985, Petitioner privately foreclosed his lien, claimed legal title to the system and attempted to re-enter and take possession of the utility. Unable to oust the receiver, he physically removed one of the pumps and shut down the water supply. When that tactic didn't succeed, he attempted to evict the receiver by filing a forcible entry and detainer action in JP court, but the receiver sought and received an order from the district court in Austin enjoining further interference with his management.

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[1] In 1985, authority to regulate water and sewer systems was transferred from the PUC to the Texas Water Commission under the Texas Water Code. See historical note Tex. Water Code Ann. § 13.001 et seq. (Vernon 1988) at 271.

[2] The Public Utilities Regulatory Act, Tex.Rev. Civ.Stat.Ann., art. 1446c (Vernon 1980), as originally enacted in 1975, contained no provision for receivership; that was added as Art. 1446C §§ 71A and 71B, effective April 7, 1981 (Vernon Supp. 1993, at 109). On receivership practice generally see Tex.R.Civ.P. 695, Tex. Civ.Prac.Rem. Code §64.001 *et seq.* Dorsaneo, *Texas Litigation Guide*, Chapter 43 (Matthew Bender, 1992).

From time to time during the pendancy of the receivership, attorneys representing the state notified Petitioner of developments in the proceedings and suggested that he intervene as he had a right to do under the applicable statutes,[3] but he failed to do so. Instead, Petitioner filed an inverse condemnation lawsuit in a district court in Lubbock County, naming as defendants the receiver, James Miller, and the City of Lubbock.

In that action Petitioner originally alleged that the receivership constituted a "taking, damaging, or destroying ... for, or application to, public use without adequate compensation" in violation of the Texas Constitution and the Fifth and Fourteenth Amendments to the United States Constitution. Subsequently, Petitioner abandoned his federal constitutional takings claims, and elected to proceed solely on the basis of his state constitutional claims.

The Public Utilities Commission intervened in the inverse condemnation action and took over the defense. In March, 1986, PUC lawyers caused the receivership case to be transferred from Travis County to Lubbock. At this point, both cases were in Lubbock County, but in different district courts.

The receiver continued to manage the utility until April, 1988, on which date administration was terminated and the receiver's final accounting approved without objection. Petitioner still had not intervened.

By the time of the termination of the receivership, the City of Lubbock had completed extension of its lines into the Carlisle community, and all of the former customers of Petitioner's private utility were hooked up to the municipal water system. Next, the PUC and City of Lubbock filed motions for summary judgment in the inverse condemnation suit. Petitioner offered no proof in the summary judgment proceeding, not even evidence of his legal title, and the district court granted summary

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[3] See footnote 2.

judgment to all movants except the PUC. The Lubbock court transferred the case back to Travis County, and the district court there granted summary judgment to the PUC.

Petitioner appealed to the Austin Court of Appeals, and it affirmed. The Texas Supreme Court denied writ of error.

On June 10, 1992, Petitioner filed his First Original Complaint in the United States District Court for the Western District of Texas, Austin Division. Petitioner brought an action for inverse condemnation alleging that Respondents, the State of Texas, the Public Utilities Commission (PUC), the Texas Water Commission, Attorney General Dan Morales, the directors and employees of these agencies in their individual and official capacities and James Miller, had taken Petitioner's property in violation of the Fifth and Fourteenth Amendments to the U.S. Constitution, and of 42 U.S.C. § 1983. Petitioner sought compensatory and punitive damages, pre- and post-judgment interest and attorney's fees.

On September 15, 1993, the parties appeared before United States Magistrate Alan Albright for a non-jury trial on the merits. Petitioner asserted two claims in the trial court: the first an action against the State of Texas[4] for "just compensation" for the taking of property and, the second, a 42 U.S.C. § 1983 civil rights claim against the individual estates of several officials, lawyers, and the receiver, James Miller.

The trial court entered a final order on September 17, 1992 denying relief on all claims. Petitioner seeks writ concerning only his takings claims against the state, and has abandoned the civil rights claims against all of the individuals. The only issue raised by this petition for writ relates to the claim for just compensation against the State of Texas.

[4] The incarnations in which the state is sued are as Public Utilities Commission, Texas Water Commission, Attorney General Dan Morales, and the directors and employees of these agencies in their official capacities.

The trial court held that the claim was barred by the Eleventh Amendment, the statute of limitations, and *res judicata*. The trial court also held that there was no compensable taking and that Petitioner had failed to prove any monetary loss as a result of the claimed taking. On June 3, 1994, the Fifth Circuit modified and affirmed the trial court judgment, holding that the dismissal of Petitioner's claims was proper for want of jurisdiction under the Eleventh Amendment.

REASONS FOR DENYING THE WRIT

ARGUMENT

I. THIS COURT SHOULD DENY CERTIORARI BECAUSE NO LEGITIMATE CONFLICT EXISTS AS TO WHETHER THE ELEVENTH AMENDMENT ACTS AS A JURISDICTIONAL BAR TO A SUIT FOR DAMAGES AGAINST A STATE IN FEDERAL COURT.

The Fifth Circuit properly concluded that the Eleventh Amendment is a jurisdictional bar to a suit for damages in federal court against a state, any state agency, or state officer in his official capacity, and that any abrogation or waiver of such a bar must be express and unequivocal. The Circuit's decision was based upon well-established Eleventh Amendment principles embraced and adopted by this Court. *Quern v. Jordan*, 440 U.S. 332, 343, 99 S.Ct. 1139, 1146 (1979); *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 98-100, 104 S.Ct. 900, 907-8 (1984); *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 462, 65 S.Ct. 347, 350 (1945).

Petitioner's Fifth Amendment just compensation action in federal court against the State of Texas is, consequently, barred for lack of jurisdiction. *John G. and Stella Marie Kenedy Mem. Foundation v. Mauro*, 21 F.3d 667, 674 (5th Cir. 1994); *Harrison v. Hickel*, 6 F.3d 1347, 1352 (9th Cir. 1993).

Petitioner's assertion that the circuits are in conflict is misplaced. Petitioner's sole reliance on an unpublished Sixth Circuit opinion does not present before this Court a legitimate conflict of binding circuit law. Unpublished opinions are not written to pronounce the law of the jurisdiction. They are written merely to inform the parties of the reasons for the court's decision, not to serve as guidance for future judicial decisionmaking. They do not contain extensive and elaborate reasoning or narrowly tailored holdings, and precise language is notably absent from them. *People of the Territory of Guam v. Yang*, 800 F.2d 945, 949 (9th Cir. 1986). They have, by definition, no controlling precedential authority, and cannot serve as the sole basis for a challenge of binding circuit law. *See e.g.* FED. R. APP. P. 47; 5TH CIR. R. 47.5.1, 47.5.3.

Consequently, federal jurisprudence would be better served by letting this issue percolate further in the circuits.

II. THIS COURT SHOULD DENY CERTIORARI BECAUSE PETITIONER'S FIFTH AMENDMENT JUST COMPENSATION CLAIM IS NOT RIPE.

Petitioner's Fifth Amendment Just Compensation claim is not properly before this Court. Petitioner has failed to exhaust the available and adequate state remedies afforded to him by the State of Texas. This Court has determined that this failure to exhaust state remedies is an unwaivable prerequisite to a Fifth Amendment suit.

> If a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation. *Williamson County Regional Planning v. Hamilton Bank*, 473 U.S. 172, 195, 105 S.Ct. 3108, 3121 (1985).

A property owner, as a matter of law, cannot suffer a violation of the Just Compensation Clause until the owner has been denied just compensation through the procedures provided by the state for obtaining such compensation. *Id.* The Fifth Amendment does not proscribe the taking of property; it only proscribes taking without just compensation. *Id.* at 194, 105 S.Ct. at 3120.

Petitioner's claim does not present to this Court an opportunity to decide whether a property owner, having exhausted all state remedies and been denied just compensation, can bring a Fifth Amendment cause of action against a state in federal court. This case contains complicated facts that render a writ improper at this time. Petitioner has not used the procedures the State of Texas has implemented to remedy government takings without just compensation. Petitioner failed to intervene in the receivership proceeding, stating that in his subjective belief he would not be successful. This remedy, which Petitioner has made no attempt to characterize as inadequate to protect his federal constitutional rights, is only one example of Petitioner's lack of diligence in seeking relief under state remedial procedures.

Petitioner subsequently filed suit in state court, first asserting, but later abandoning, his Fifth Amendment Just Compensation action. Petitioner ultimately proceeded solely under the Texas Constitution's takings clause. Petitioner, having elected not to argue his Fifth Amendment claim in state court, and having lost his takings case under the Texas Constitution, now asserts that the state remedy is inadequate in actual practice to provide him with just compensation under the Fifth Amendment.

Petitioner seems to equate success of his claim in the state courts with an adequate and available state remedy. If this were the case, every plaintiff who was dissatisfied with the results of his state takings lawsuit could demand relief from the federal courts. Neither lack of success in a state court, nor a claimed

inadequacy of an award rise to the level of a constitutional question.

The test for an available and adequate state procedure for seeking just compensation begins with the presumption that the state procedure implemented is fair. A plaintiff then carries the burden of establishing that the state law unquestionably would afford him no remedy. *See Samaad v. City of Dallas*, 940 F.2d 925, 935 (5th Cir. 1991). Petitioner's assertion that Texas law affords him no remedy, based solely on the Texas courts' findings that he was entitled to no compensation, is incorrect. Comparison of state and federal law reveals that Texas law is as liberal, if not more so, as federal law in compensating property owners subjected to regulatory takings under the police power. *Id.* at 936.

Under federal law, regulatory takings that involve physical invasion of property entitle the owner to compensation even if the taking is only partial or temporary. *Lucas v. South Carolina Coastal Council*, __ U.S. __, 112 S.Ct. 2886, 2892 (1992); *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 318, 107 S.Ct. 2378, 2388 (1987). On the other hand, where the government does not physically occupy the property but only restricts its use -- for example, by zoning ordinance -- federal law requires compensation only if the effect is a total denial of all economically beneficial uses of the property. *Lucas*, 112 S.Ct at 2895; *First English*, 482 U.S. at 320, 107 S.Ct at 2388. Land use regulations which merely diminish the value are not takings under federal law and are not required to be compensated. Federal law does nor require compensation for mere damage to property as does Texas law. *Id.*

An analysis of Texas eminent domain law begins with Article I, Section 17 of the Texas Constitution.

> "No person's property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation."

The Texas Supreme Court has interpreted this language to create a cause of action under state law for the recovery of the economic value of property resulting from valid scenic zoning regulations enacted under the police power, whether the losses are permanent or temporary. *City of Austin v. Teague*, 570 S.W.2d 389, 394 (Tex. 1978). The Texas Constitution, therefore, compensates for regulatory takings at least as liberally as does the federal. In addition, state law apparently goes further than federal law and provides a remedy for mere damage to property resulting from lawful exercise of police power whether or not it amounts to a taking. *Steele v. City of Houston*, 603 S.W.2d 786, 789 (Tex. 1980).

It is clear that since Texas has fashioned remedies that meet or surpass federal standards[5], these remedies are far from being "unavailable" or "inadequate." Petitioner's assertion that the decision of the Texas state courts granting summary judgment against him in his state takings action, constitutes evidence of an inadequate and unavailable remedy, is erroneous and presents no substantive question for this Court's determination.

III. THIS COURT SHOULD DENY CERTIORARI BECAUSE PETITIONER HAS AN ALTERNATIVE FORUM FOR ADJUDICATING HIS FIFTH AMENDMENT JUST COMPENSATION CLAIM.

The Fifth Circuit correctly concluded that Petitioner is not without recourse as to his Fifth Amendment Just Compensation claim. The Texas courts are open to Fifth Amendment inverse condemnation suits for damages against the state. This

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[5] *See Williamson County*, 473 U.S. at 196, 105 S.Ct. at 3122; *Samaad*, 940 F.2d at 934-35.

availability is not disputed by Petitioner, and is further evidenced by his filing such an action in state court. Petitioner, nonetheless, claims that he should have the additional right to a trial in federal court, and argues that applying the Eleventh Amendment to bar Fifth Amendment Takings claims against a state in federal court will have "the effect of rendering the takings clause of the Fifth Amendment meaningless as applied to the states." This statement is inaccurate. A property owner who has suffered a taking by a state has a forum available in which he may have his Fifth Amendment rights adjudicated. Plaintiff asserts that this remedy is inadequate given his unsuccessful state court suit in which the appellate court ruled that compensation was not required for the loss Petitioner sustained. The question of whether compensation is required is a question of fact that, in this case, has been decided under the Texas Constitution. This determination was also available to Petitioner under the U.S. Constitution had he chosen to litigate that issue. Petitioner's assertion concerning the adequacy of the state remedy at this time, however, is inappropriate.

Petitioner refers at length to *First English*, to support his contention that he has a right to a federal cause of action for his Fifth Amendment takings claim. This is not the case. In *First English*, the Plaintiff brought its Fifth Amendment claim *in state court against a defendant that was not a state*. It is not disputed that a property owner can maintain this type of suit against a municipality or county. *See Mt. Healthy Board of Education v. Doyle*, 429 U.S. 274, 280-81, 97 S.Ct. 568, 572-73 (1977); *Monell v. Department of Social Services*, 436 U.S. 658, 690, 98 S.Ct. 2018, 2035 (1978). This rule of law, however, does not support Petitioner's contention that such a suit can be maintained in federal court against a state.

Further, *First English* actually supports the principle that the litigation of Fifth Amendment claims in *state* court is sufficient to afford a person his rights under the Fifth Amendment. Petitioner could have brought his Fifth Amendment claim in state court just as the plaintiffs in *First English* did, but elected not to. Texas courts have been, and continue to be, open to

inverse condemnation damage claims on the basis of the Fifth Amendment. *State v. Biggar*, 873 S.W.2d 11, 13 (Tex.1994); *Estate of Scott v. Victoria County*, 778 S.W.2d 585, 589-91 (Tex.App. -- Corpus Christi 1989, n.w.h.); *Grand Prarie v. Sisters of Holy Family*, 868 S.W. 2d 835, 844 (Tex.App. -- Dallas 1993, n.w.h.). Thus the Fifth Circuit's holding, contrary to Petitioner's assertion, has not rendered the Fifth Amendment meaningless. Petitioner's writ should, therefore, be denied.

CONCLUSION

Respondents respectfully request that this Court deny Petitioner's Writ of Certiorari to the United States Supreme Court.

Respectfully submitted,

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